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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2007 OAL DETERMINATION No. 2
(OAL FILE ## CTU 06-0829-01 AND 06-0831-02)

Jenna Brown
JENNA BROWN
SECRETARY OF STATE

REQUESTED BY: CHRISTOPHER HARBRIDGE AND DARRYL WAKEFIELD
AGENCY: DEPARTMENT OF CORRECTIONS AND REHABILITATION
CONCERNING: MEMORANDUM DD58-03, DOUBLE CELL HOUSING POLICY
**DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE
SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule is an "underground regulation" as defined in Government Code section 11342.5, and must, therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

In August 2006, Mr. Harbridge and Mr. Wakefield (Petitioners) submitted similar petitions to OAL alleging that the California Department of Corrections and Rehabilitation (CDCR) issued, used, enforced, or attempted to enforce an underground regulation¹ in violation of Government Code section 11340.5.² The alleged underground regulations are contained in Memorandum DD58-03 (Memorandum), issued by W.A. Duncan, Deputy Director, Institutions Division, addressed to Regional Administrators,

¹ An underground regulation is defined in Title 1, California Code of Regulations, section 250:
"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

² Unless specified otherwise code references are to the California Government Code.

Wardens, Classification and Parole Representatives, Correctional Counselor IIIs/Reception Centers and Classification Staff Representatives. The subject of the Memorandum is Double-Cell Housing Policy.

DETERMINATION

OAL determines that the Memorandum meets the definition of an underground regulation, is subject to the rulemaking requirements of the APA, and, therefore, was issued in violation of the APA.

FACTUAL BACKGROUND

The Memorandum was issued on April 25, 2003. It is attached to this determination as Attachment #1. It states, in part:

It is departmental policy and therefore the expectation that inmates double-cell and accept housing assignments as directed by staff. The double-cell policy is to be adhered to in General Population, Administrative Segregation Unit (ASU), and Security Housing Unit (SHU) settings. If staff determine that an inmate is suitable for double-celled housing, the inmate shall be expected to accept the housing assignment and shall be held accountable and responsible for his or her actions and subject to disciplinary action as a result of staff enforcing the double-cell housing assignment.

The Memorandum concludes with the following paragraph:

The Classification Services Unit (CSU) is currently drafting and processing revisions to the CCR and the Department Operations Manual to increase the sanctions to be taken against inmates who refuse to accept a cellmate as assigned by staff.

Mr. Harbridge and Mr. Wakefield both allege that disciplinary action has been taken against them based upon enforcement of this Memorandum.

PETITIONERS' ARGUMENT

The petitioners argue that the Memorandum is a rule, regulation, order, or standard of general application adopted by an agency to implement, interpret or make specific the law enforced or administered by the agency or to govern its procedure. The Memorandum was issued to all California State Prisons to be used in all General Populations, Administrative Segregation Unit (ASU) and Security Housing Unit (SHU) settings.

AGENCY RESPONSE

CDCR did not submit a formal response; however, it did note that it was “working on proposed regulations to address the issues raised in the Wakefield and Hardridge (sic) Petitions.³”

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states, in part:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation. “Underground regulation” is defined in title 1, Cal. Code Regs. § 250 as follows:

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5 subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference”⁴ in any subsequent litigation of the issue.

ANALYSIS

To determine that an agency is in violation of section 11340.5, it must be demonstrated that the alleged underground regulation actually is a regulation as defined by section

³ Email from Timothy Lockwood, Chief, Regulation and Policy Management Branch, Corrections Standards Authority of the Department of Corrections and Rehabilitation, dated December 4, 2006.

⁴ *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244

11342.600, that it has not been adopted pursuant to the APA, and that it is not subject to an express statutory exemption from the APA.

A regulation is defined in section 11342.600 as:

“... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western Inc. v. Victoria Bradshaw*, (1996)14 Cal.4th 557, 571, the California Supreme Court found that:

“A regulation subject to the Administrative Procedure Act (APA) (Gov. Code § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code § 11342 subd. (g).)”

The first element of a regulation is whether the rule applies generally. For an agency rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.⁵

The Memorandum requires that all inmates double-cell unless they are classified as requiring a single-cell. The Memorandum also lists the criteria to be used to classify an inmate as requiring a double-cell or a single-cell. By the express terms of the Memorandum, these requirements apply to all “General Population, Administrative Segregation Unit (ASU), and Security Housing Unit (SHU) settings.” The Memorandum, then, applies to most, if not all, inmates in the adult correctional system. It is a standard of general application.

The first element required by *Tidewater* is therefore met.

The second element is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.

⁵ *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class.).

On July 1, 2005, the Department of Corrections, under which this Memorandum was issued, was reorganized into the Department of Corrections and Rehabilitation.⁶ Penal Code section 5054 provides that:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

Penal Code section 5058, subdivision (a), states:

“5058. (a) The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.”

The departmental policy requiring double-celling and the criteria for classifying an inmate for double- or single-cell housing expressed in the Memorandum directly affects the “the care, custody, treatment, training, discipline and employment of persons” in correctional institutions. The policy can have a direct impact on inmates and a violation can result in a longer sentence or continued housing in a SHU. These issues are clearly within the statutory mandate of the Department. The Memorandum, then, implements, interprets, or makes specific Penal Code section 5058. Furthermore, the Memorandum implements, interprets and makes specific Title 15 Code of California Regulations, section 3315, which describes what inmate conduct constitutes a ‘serious rule’ violation. The second element in *Tidewater* is therefore met.

The third step in the analysis is whether an exemption from the requirements of the APA applies to the challenged rule. Pursuant to section 11346, the procedures established in

⁶ Penal Code section 5055. Commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the Department of Corrections and Rehabilitation, except where those powers and duties are expressly vested by law in the Board of Parole Hearings.

Whenever a power is granted to the secretary or a duty is imposed upon the secretary, the power may be exercised or the duty performed by a subordinate officer to the secretary or by a person authorized pursuant to law by the secretary.

the APA "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

Penal Code section 5058 establishes exemptions expressly for the Department:

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility, provided that the following conditions are met:

"(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

"(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

"(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to Sections 6650 to 6670, inclusive, of the State Administrative Manual.

"(3) Rules issued by the director that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code."

The first of these exemptions is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution. In the case of this Memorandum, the requirements apply to all institutions in California and to all populations within the institutions. The Memorandum cannot be classified as a "local rule."

The second exemption applies to situations in which an institution is opening or is closing within six months. Again, that is not applicable here.

The final exemption is for rules that are excluded from disclosure to the public. The Memorandum has been widely distributed. There is no evidence that it is excluded from disclosure to the public.

We can find no other APA exemptions which would apply to this Memorandum. The Department has not identified any express exemption from the APA which would include this Memorandum.

CONCLUSION

For these reasons, OAL concludes that the Memorandum DD58-03, issued by W.A. Duncan, Deputy Director, Institutions Division, entitled Double-Cell Housing Policy is an underground regulation.



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ATTACHMENT #1

Memorandum

Date : April 25, 2003

DD58-03

To : Regional Administrators, Institutions Division
Wardens
Classification and Parole Representatives
Correctional Counselor IIIs/Reception Centers
Classification Staff Representatives

Subject : DOUBLE-CELL HOUSING POLICY

It is departmental policy and therefore the expectation that inmates double-cell and accept housing assignments as directed by staff. This double-cell policy is to be adhered to in General Population, Administrative Segregation Unit (ASU), and Security Housing Unit (SHU) settings. If staff determine that an inmate is suitable for double-celled housing, the inmate shall be expected to accept the housing assignment and shall be held accountable and responsible for his or her actions and subject to disciplinary action as a result of staff enforcing the double-cell housing assignment.

It is imperative that Wardens maximize proper bed utilization and ensure that inmates are appropriately housed. Under current single-cell policy, inmates who are identified as having a history of in-cell sexual abuse, assaultive behavior toward a cell partner, significant in-cell violence against a cell partner, or verification of predatory behavior toward a cell or dormitory partner shall be reviewed and evaluated for single-cell status. Upon determination by a classification committee that an inmate warrants single-cell status, an "S" suffix shall be affixed to the inmate's custody determination. All other inmates are expected and required to be double-celled.

Unless the above-listed case factors are present and a classification committee has affixed an "S" suffix to an inmate's custody, or an inmate is pending referral and review for "S" suffix determination by a classification committee, inmates requiring celled housing are not entitled to single-cell assignment, housing location of choice, or to a cellmate of choice. If the inmate refuses to double-cell, staff shall:

- Based on the inmate's action being a serious disruption of facility operations, California Code of Regulations [CCR] Section 3315(a)(2)(C), and the inmate's act of disobedience created a potential for violence or mass disruptive conduct, CCR Section 3315(a)(3)(H), issue the inmate a California Department of Corrections (CDC) Form 115, *Rules Violation Report*, charging him or her with the specific act of "Refusing a Direct Order," a Division F level offense.
- Upon adjudication of the CDC Form 115, staff shall attempt to double-cell the inmate by physically escorting the inmate or prospective cellmate to the designated cell. If the inmate refuses to double-cell or accept the prospective cellmate, the inmate shall be issued a CDC Form 115 charging him or her with the specific act of "Willfully Delaying/Obstructing a Peace Officer in Performance of their Duties," a Division D level offense.

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- If the inmate conveys to staff a threat against any prospective cellmate and the threat prevents staff from double-celling the inmate, the inmate shall be issued a CDC Form 115 charging him or her with the specific act of "Willfully Delaying/Obstructing a Peace Officer in Performance of Their Duties by Means of a Threat," a Division D level offense (Penal Code [PC] Section 69).
- If the inmate willfully threatens the prospective cellmate with death or great bodily injury and causes the prospective cellmate to reasonably be in sustained fear for his or her safety, the inmate shall be issued a CDC Form 115 charging him or her with the specific act of "Threatening the Life of (name of person)" or "Threatening Serious Bodily Injury to (name of person)," a Division B level offense (PC Section 422) pursuant to CCR Section 3323 (d)(7). The inmate shall also be placed in ASU and, if found guilty of the offense, shall be assessed a SHU term and referred to a Classification Staff Representative (CSR) for review of a determinate SHU term. If found guilty of multiple "Threatening the Life of (name of person)" or "Threatening Serious Bodily Injury to (name of person)" offenses, the inmate shall be referred to a CSR for review of an indeterminate SHU term.
- If the inmate's verbal statements directed toward the prospective cellmate do not rise to the threshold of a felony level threat (the inmate does not threaten the prospective cellmate with death or great bodily injury and causes the prospective cellmate to reasonably be in sustained fear for his or her safety), the inmate shall be charged with the specific act of "Conduct Which May Lead to Force and Violence," a Division F level offense.

It is also a behavioral expectation that all inmates serving an indeterminate SHU term with no double-cell prohibitions be double-celled prior to being considered for release from SHU. In addition, all inmates housed on Sensitive Need Yards shall be required to be double-celled.

Single-cell status shall be designated for those inmates who demonstrate, or have demonstrated, significant in-cell physical or sexual violence against a cell partner if there is verification of predatory behavior. Staff are reminded to use correctional experience, correctional awareness, a sense of reasonableness, knowledge of the inmate population, facility environment, and the level of supervision in the housing unit when determining an inmate's need for single-cell housing.

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Predatory behavior depicts aggressive, repeated attempts to physically or sexually abuse another inmate. The classification committee shall consider the circumstances of a prior in-cell physical or sexual battery against a cell partner, length of time in General Population without disciplinary violations, precipitating factors, or new issues affecting the inmate's behavior. An act of mutual combat in itself does not warrant single-cell status.

Staff shall consider the inmate's pattern of behavior, not just an isolated incident, and must weigh information in the inmate's Central File, such as:

- Documented and substantiated reports from prior cellmate(s) that the inmate intimidated, threatened, forced, and/or harassed him or her for sex.
- Documentation that the cellmate(s) refused to return to a cell occupied by the inmate because of fear, threats, or abuse perpetrated by the inmate.
- Adjudicated CDC Form 115 where the inmate was found guilty as a perpetrator in an act of murder, attempted murder, battery causing serious injury, battery, rape or attempted rape, sodomy or attempted sodomy, oral copulation and attempted oral copulation against the victim's will, or other acts of force against cellmates.

In cases where single-cell status is recommended by clinical staff due to mental health or medical concerns, the classification committee shall make the final determination of an inmate's cell assignment. The classification committee shall evaluate the clinical recommendations made by the clinician who participates in the committee and review the inmate's case factors when determining the housing assignment. Staff are reminded that single-cell status based on clinical recommendation is usually a temporary, short-term measure and must be periodically reviewed.

The Classification Services Unit (CSU) is currently drafting and processing revisions to the CCR and the Department Operations Manual to increase the sanctions to be taken against inmates who refuse to accept a cellmate as assigned by staff.

If you have any questions, please contact Marilyn Kalvelage, Chief, Institution Operations, Institutions Division, at (916) 323-4108. For technical information, institution staff may contact Linda Rianda, Chief, CSU, at (916) 322-2544.

Original Signed by W. A. Duncan

W. A. DUNCAN
Deputy Director
Institutions Division

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